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In The

Supreme Court of the United States

October Term 1981

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

– against –

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE NEW YORK STATE COMMISSION ON THE QUALITY OF CARE FOR THE MENTALLY DISABLED, PROTECTION AND ADVOCACY SYSTEM, AS AMICUS CURIAE

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INTEREST OF THE AMICUS

The Commission on the Quality Care for the Mentally Disabled (the "Commission) is an independent state agency within the Executive Department of the State of New York. It is designated by the Governor as the agency responsible for the establishment of a statewide system of protection and advocacy for developmentally disabled persons, as mandated by the Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C. §§ 6001 et seq. The Commission devotes significant resources to the problems that developmentally disabled children confront in securing the "free appropriate public education" required under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (the "Act"). From its direct experience with the difficulties developmentally disabled persons face in all aspects of their lives, the Commission has come to realize that education is often the key factor in shaping their potential ability to become productive and contributing members

of society. Thus, the question of what is an "appropriate education" is of crucial significance to the Commission's protection and advocacy function, and to the children it serves.*

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* The Commission has received the consent of petitioners and respondents to file this brief. Their letters of consent are filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Act grants to handicapped children a "free appropriate public education": the same educational opportunity long enjoyed by the non-handicapped. This mandate is clear both from the language of the Act as well as from the legislative history. The suggestion in the dissent below, and repeated by petitioners here, that Congress intended to do no more for the handicapped child once he had reached "self-sufficiency" is wholly inconsistent with the language of the statute and its purpose. This statute was not intended to confine handicapped children to a life of packing small boxes on an assembly line; it was to give them the same chance to develop their abilities that other children have long enjoyed.

The purpose section of the Act expressly demonstrates Congress' intent to provide handicapped children with full equality of opportunity. Moreover, the relevant House and Senate reports explicitly rely on this Court's

decision in Brown v. Board of Education, 347 U.S. 483 (1954), as setting the standard of equal educational opportunity which Congress intended, through the Act, to make a reality for every handicapped child. Finally, the statements of individual congressmen, when considered in context, clearly indicate that it was not Congress' intent to enact an educational scheme merely to allow the handicapped child to reach a level of self-sufficiency. Rather these remarks demonstrate that it was the intent of Congress to allow and encourage the handicapped child to develop his full capabilities to the same extent as the non-handicapped.

The lower courts correctly discerned Congress' intent in formulating a definition of "appropriate education."

ARGUMENT

I. The Act is Intended to Provide Handicapped Children with the Same Educational Opportunities as Provided Non-Handicapped Children.

1. The Language of the Statute

The Act's very statement of purpose shows Congress' finding that (1) it is the lack of "appropriate educational services" which leads to lack of "full equality of educational opportunity"; (2) the lack of full equality of educational opportunity violates the guarantee of equal protection of the law; and (3) the essential purpose of the Act is "to assure equal protection of the law." In the purpose section of the Act, Congress made the following findings:

> (1) there are more than eight million handicapped children in the United States today:
>
> (2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

* * *

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of the handicapped in order to assure equal protection of the Law. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(b), 89 Stat. 773, 774 (1975) (emphasis added).

The Act mandates that, to be eligible for funding, a state must file a plan showing that "a goal of providing full educational opportunity to all handicapped children" is established. 20 U.S.C. § 1412(2)(A)(emphasis added). The only vehicle set forth in the Act for a state to achieve such a goal is the provision of a free appropriate public educa-

tion.* See 20 U.S.C. § 1412(1). Thus, rather than looking towards a "self sufficiency" standard, the statutory scheme makes clear that a free appropriate public education is the means by which a full or equal educational opportunity is to be provided to handicapped children.

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* The dissent below claimed Judge Broderick's decision in the district court was premised on a "basic error" that the Act does not define "appropriate education." Rowley v. Board of Education, 632 F.2d 945, 951 (2d Cir. 1980). There was no such "basic error" in the lower court's decision, however. The Act defines the term "free appropriate public education," not "appropriate education." Thus, the Act states that:

> The term 'free appropriate public education' means special education and related services which * * *, (C) include[s] an appropriate preschool, elementary, or secondary school education in the State involved. 20 U.S.C. § 1401(18) (emphasis added).

The components of element (C) -- an appropriate preschool, elementary or secondary school education, the meaning of which is the main issue in the case -- are left completly undefined.

Clearly, full equality of educational opportunities can only be provided, as the district court concluded, by first comparing the educational opportunity offered to the handicapped child to that offered his non-handicapped classmate. Rowley v. Board of Education, 483 F. Supp. 528, 534 (S.D.N.Y. 1980), aff'd, 632 F.2d 945 (2d Cir. 1980). Since the Act unquestionably intends to provide handicapped children with such opportunities, it follows inescapably that Congress in drafting the Act intended a comparison* between educational opportunities provided the handicapped and the non-handicapped child in

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* The Act's requirement of a comparison between educational opportunities afforded to handicapped and to non-handicapped children does not make it unworkable by any means. The federal courts, in implementing the mandate of Brown v. Board of Education, 347 U.S. 483 (1954), have utilized comparisons between the education received in white and non-white schools in order to test whether or not an equal educational opportunity is being provided by the school district. Bulluck v. Washington, 468 F.2d 1096, 1105 (D.C. Cir. 1972); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

determining whether such an education was being provided.*

2. The Committee Reports

The legislative history of the Act refutes the argument that Congress was "simply concerned," Rowley v. Board of Education, 632 F.2d 945, 952 (2d Cir. 1980), with enabling handicapped children to become self-sufficient and did not intend that a comparison be made between the educational opportunities offered the handicapped and non-handicapped child, in

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* Congress, in enacting the Education for All Handicapped Children Act, was, in effect, mandating that states modify their educational curricula to accommodate handicapped children in order to receive funds under the Act. The instant case is, therefore, completely distinguishable from the problem faced by the Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979). There the Court had to determine whether § 504 of the Rehabilitation Act of 1973 required affirmative action by an educational institution, which would lead to a lowering of standards, to accommodate the needs of a handicapped student. Indeed, the moving force behind the Act is the conviction that many handicapped children who receive appropriate educational services throughout their childhood will be able to attend institutions of higher learning without having to cause those institutions to lower their standards.

order that the handicapped child receive equal educational opportunities. Indeed, as the House Education and Labor Committee Report expressly stated, the goal of each child's educational plan is to allow the child "to achieve his or her maximum potential" -- clearly a goal greater than self-sufficiency. H. Rep. No. 332, 94th Cong., 1st Sess. 19 (1975) (emphasis added). And the Senate Labor and Public Welfare Committee Report stated that the purpose of the Act is to "assure that full educational opportunities are available to all handicapped children." S. Rep. No. 168, 94th Cong., 1st Sess. 3 (1975). Moreover, as is noted in the Senate Report, "[t]his Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and prosperity of our people * * * It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped

children are provided equal educational opportunity." Id. at 9.

Congress thus recognized that the provision of an appropriate education meant providing the handicapped child with full educational opportunities. It would be bitterly ironic to now turn the Act on its head by stating that all that is required by an appropriate education is to make handicapped children self-sufficient. Congress intended no such thing.

The petitioners, advocates of an "adequacy" or "self-sufficiency" standard of appropriate education, present a simple, but flawed, argument. First, they assert that landmark cases having to do with education of the handicapped, e.g., Pennsylvania Association for Retarded Children ("P.A.R.C.") v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972) and Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972), concern themselves only with guaranteeing that a handicapped child receive

an education, whatever the type or quality. It is claimed that these cases do not speak in terms of comparing educational opportunities of the handicapped and the non-handicapped. Second, these advocates assert that since the Senate Committee Report cites P.A.R.C. and Mills, the Act does not require such a comparison.

Strangely absent from petitioners' brief, however, is any mention of Brown v. Board of Education, 347 U.S. 483 (1954). Yet in the Congressional Committee Reports, this case is recognized as the font of authority for providing equal educational opportunities to the handicapped:

> In 1954, the Supreme Court of the United States established the principle that all children be guaranteed equal educational opportunity. The Court stated: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity * * * is a right

> which must be made available to all on equal terms." (Brown v. Board of Education). S. Rep. No. 168, 94th Cong., 1st Sess. 6 (1975) (ellipsis inserted by the Committee)

Indeed, what the P.A.R.C. and Mills courts were faced with were shocking statistics: "of the more than 8 million children (between birth and twenty-one years of age) with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education." S. Rep. No. 162, 94th Cong., 1st Sess. 6 (1975).

Thus there is no conflict at all between decisions such as those in P.A.R.C. and Mills, which ordered that handicapped children who were being excluded from the publicly-supported educational system be provided with educational services forthwith, and a determination

that, under the terms of the Act, equal educational opportunities are mandated.

3. The Congressional Debates

In the dissent below, 632 F.2d at 952 & n.2, and in the petitioners brief, various excerpts from statements made on the floor of Congress are cited which, it is claimed, establish that Congress was not concerned with comparing the potential of handicapped children to those of the non-handicapped in order to ensure the provision of an appropriate education. Brief of Petitioners at 64-65. For example, the dissent below pointed to a statement of Senator Williams that the Act will mean that handicapped children "will not have to depend on subsistence payments from public funds." 632 F.2d at 952 n.2.

Nothing in that statement of Senator Williams or in any of the other excerpts from the legislative debates is in any way inconsistent with the fact that Congress intended to afford handicapped children an equal

footing as to their education. With respect to some handicapped children, obviously, the most that one could hope for is that they become "self-sufficient". But it was clearly not the intent of Congress to relegate all handicapped children to lives of menial employment which would merely provide self-sufficiency. The point is that with both the child who can never be expected fully to compensate for his handicap (e.g., the severely mentally retarded child) and the child who has a handicap for which he could compensate (e.g., many orthopedically impaired children) Congress intended that a comparison with non-handicapped children be made to ensure that a handicapped child is afforded the same opportunity as the non-handicapped child to reach his particular potential, whether it is life in a sheltered workshop or the Presidency of the United States.

This conclusion is obvious from of the statements made during the debates on this legislation. Senator Randolph, the chairman

of the Subcommittee on the Handicapped, noted that

> The Education for All Handicapped Children Act of 1975 promises handicapped children the educational opportunity that has long been considered the right of every other American child. 121 Cong. Rec. S37,410 (1975) (emphasis added).

Senator Randolph also pointed out that the Act calls for the submission by the state of a plan that assures "that a goal is established for providing full educational opportunities for all handicapped children." Id.

Senator Stafford, the ranking minority member of the Subcommittee, stated that

> This is the day that handicapped children and their parents can point to and say that this Congress -- their Congress -- recognized as a matter of national policy, the equal protection under the law that they have always deserved. Id. at S37,411 (emphasis added).

Senator Stafford also noted, "[w]e can all agree that all handicapped children should be receiving an education. We can all agree that that education should be equivalent, at least, to the one those children who are not handi-

capped receive." Id. at S19,483 (1975) (emphasis added).

Senator Williams, the Chairman of the Committee on Labor and Public Welfare, stated that:

> The Constitution provides that all people shall be treated equally, but we know that, while all youngsters have an equal right to education, those who live with handicaps have not been accorded this right. This measure fulfills the promise of the Constitution that there shall be equality of education for all people, and that handicapped children no longer will be left out. Id. at S37,413 (1975) (emphasis added).

The goal of equal educational opportunity is supported by the statements of many other Senators including Senator Taft:

> The educational problems in America will never be resolved until the quality of education for all children attains a level commensurate with the demands of life in our complex society and offers the opportunity for the fulfillment of the potential abilities of all children, especially our handicapped children. * * * The goal of this legislation is to raise the quality of education for millions of handicapped children to a new standard of excellence and equal opportunity never before envisioned. Id. at S37,412;

Senator Cranston:

> [T]he right to free appropriate public education has long been the right of certain children in this country between the ages of 5 and 17; but the right has not been extended universally in our country. Some 7.8 million children who fall within this age group are largely excluded from the educational opportunities that we give to our other children. They are chidren with physically and emotionally handicapping conditions. Id. at S19,502 (1975);

Senator Beall:

> I hope that our efforts will bring forth the kind of program assistance that the Federal Government must provide to insure free and equal educational opportunities for the handicapped. Id. at S19,506;

and Senator Schweiker:

> The Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. Id. at S19,504.

Clearly, these statements support the conclusion that the Act is intended to provide each handicapped child with the educational opportunities that will permit him to reach his full potential on an equal basis with other children.

II. A Judicially Imposed "Self-Sufficiency" Standard to Define "Appropriate Education" Would Destroy the Intent of the Act.

The Commission's specific concern in this action arises from the view expressed in the dissent below that "the aim of the Act is to develop a handicapped child's self-sufficiency." 632 F.2d at 952. Such a "self-sufficiency" limitation on a handicapped child's educational opportunity represents a serious misreading of Congressional intent. Indeed, as this brief demonstrates supra, the intent of the legislation at issue was to enable handicapped children to have an "educational opportunity" equal to that afforded to non-handicapped peers. Thus, just as the goal of this country's educational system is to provide the opportunity for the non-handicapped child to achieve his intellectual potential, the goal for the handicapped child must be the same.

The self-sufficiency standard applied to Amy Rowley would deny her any benefit from the

Act, beyond what petitioners voluntarily see fit to provide, since it is already evident, as the dissent noted, that she "will become a productive member of society." 632 F.2d at 953.

More central to the Commission's concerns, however, is the harm such a standard would cause to the intellectually handicapped child. For these children, it is an easy solution to equate appropriate education with goal of self-sufficiency.* But it is a solution not envisioned by the legislature.

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* Indeed, the spectre of a double standard for two classes of handicapped children -- the intellectually and the non-intellectually impaired -- is made explicit in the brief for the United States as Amicus Curiae, which states:

> These ["functioning member of society" and "self-sufficiency"] standards, although perhaps applicable in determining the appropriate educational program for children whose intellectual capacity is impaired by their handicap, are inconsistent with the legislative emphasis on equality of education * * * as applied to children whose intellectual capacity is not so impaired. Brief for the United States as Amicus Curiae at n.5.

Self-sufficiency for an intellectually impaired child may in fact be a legitimate goal, but only if that goal is developed through the process of preparing the "individualized education program" in consultation with the child's parents, as mandated by the Act. 20 U.S.C. § 1414(a)(3)(B)(5). The program must include, according to federal regulation, "a statement of annual goals." 45 C.F.R. § 121a.125. To have a "self-sufficiency" goal judicially imposed for every intellectually impaired child is to destroy the spirit and the purpose of this law.

III. The Lower Courts Properly Interpreted the Act to Effectuate Congress' Intent.

In formulating its definition of appropriate education, the district court correctly discerned the congressional intent to provide handicapped children with equal educational opportunities. Thus that court wrote:

> An "appropriate education" could mean an 'adequate' education -- that is, an education substantial

> enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full potential. Between those two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. 483 F. Supp. at 534 (emphasis added).

Judge Broderick's rejection of a "full potential" standard is a reasonable interpretation of what "equal" means. Due to fiscal constraints and other factors, a non-handicapped child may not be afforded a complete opportunity to achieve his or her potential. Similarly, a school system need not go to every extreme to provide an appropriate education for the handicapped child. But both the district court and the court of appeals correctly held, as to Amy Rowley, that more was required to provide her with equal educational opportunity. The provision of a sign language

interpreter to Amy Rowley is completely in keeping with the accommodations to the handicapped mandated by the Act, and therefore, the judgment should be affirmed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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